

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE**

VENTANA MEDICAL SYSTEMS INC.,

Plaintiff,

v.

DAKOCYTOMATION CALIFORNIA INC.,

Defendant.

C. A. No. 04-1522-GMS

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**DEFENDANT'S MOTION FOR SUMMARY JUDGMENT OF NONINFRINGEMENT**

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California Inc.*

Dated: March 16, 2006

Pursuant to Fed. R. Civ. P. 56, Defendant DakoCytomation California Inc. (“Dako”) hereby moves for summary judgment of noninfringement.

The plaintiff, Ventana Medical Systems Inc. (“Ventana”), accuses Dako of infringing claims 1-7, 20-22, 24-25, 30, and 45 of U.S. Patent No. 6,827,901 (“the ‘901 patent”) by making, using, offering to sell, and/or selling its Artisan® product. (D.I. 1.) Each of these asserted claims requires “an air mixer comprising an air jet and an air supply means positioned adjacent to [a] said reagent agitation zone for mixing reagents, said air mixer directing a jet of air at the reagent agitation zone thereby inducing mixing in the reagent agitation zone.” The Court has construed “adjacent” to mean “next to, but not above or beneath.” (D.I. 56.)

In the accused Artisan® product, the air mixer is above, not adjacent to, the reagent agitation zone. The Artisan®, therefore, does not literally infringe.

The Artisan® also does not infringe under the doctrine of equivalents. Any possibility of equivalence infringement is precluded, as a matter of law, by: (a) prosecution history estoppel; (b) the principle of claim vitiation; and (c) the specific exclusion principle.

WHEREFORE, Dako moves for summary judgment of noninfringement, both literal and under the doctrine of equivalents. Filed with this Motion are a Memorandum in Support, a Declaration of Scott Leon, and a Declaration of Michael E. Zeliger, with exhibits.

**CONNOLLY BOVE LODGE & HUTZ LLP**

/s/ James M. Lennon

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March 16, 2006

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on that on March 16, 2006, I electronically filed the foregoing DEFENDANT'S MOTION FOR SUMMARY JUDGMENT OF NONINFRINGEMENT with the Clerk of Court using CM/ECF which will send notification of such filing to the following:

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I HEREBY CERTIFY that on March 16, 2006, I mailed via Federal Express, the foregoing DEFENDANT'S MOTION FOR SUMMARY JUDGMENT OF NONINFRINGEMENT to the following non-registered participants:

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